

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

In the Matter of the Remedial Action at:)

Burlington Northern Railroad
Maintenance and Fueling Facility
Skykomish, Washington

AGREED ORDER
No. DE 91TC-N213

TO: Ms. Anne B. Little
Burlington Northern Railroad
3800 Continental Plaza
777 Main Street
Fort Worth, Texas 76102

I.

Jurisdiction

This Agreed Order ("Order") is issued pursuant to the authority of
RCW 70.105D.050(1).

II.

Findings of Fact

The Department of Ecology (Ecology) makes the following Findings of Fact without adjudication or admission of any such facts by Burlington Northern Railroad:

1. Burlington Northern Railroad is the current owner and operator of the Burlington Northern Skykomish Maintenance and Fueling Facility (Maintenance and Fueling Facility), formerly known as the Burlington Northern Rail Yard, located in Skykomish, Washington.
2. Great Northern Railroad owned and operated the Maintenance and Fueling Facility until 1970 when Great Northern Railroad merged with four other railroad companies to become the Burlington Northern Railroad.

3. The Maintenance and Fueling Facility was used to refuel and maintain locomotives from the late 1800s until those operations were discontinued in 1974. During different periods of the 75 years of operation, coal, bunker oil, electricity and diesel fuel were used to power locomotives. "Site History: Skykomish Maintenance and Fueling Facility," Jack Berryman (July 1990).
4. Since 1974, the Maintenance and Fueling Facility has been used as a base of operations for Burlington Northern Railroad track maintenance and snow removal crews. "Site History," Jack Berryman (1990).
5. Petroleum products have been detected in the soil and groundwater at the Maintenance and Fueling Facility and the surrounding area. PCBs and lead have been detected in isolated areas of the Maintenance and Fueling Facility soils. The presence of petroleum and PCBs was documented in the 1991 GeoEngineers, Inc. Phase I Report, Site Assessment and Remedial Evaluation, Burlington Northern Rail Yard, Skykomish, Washington, Prepared for Burlington Northern Railroad and Response to Ecology's Comments/Questions, Burlington Northern Rail Yard, Skykomish, Washington for Burlington Northern Rail Yard (July 1991). The presence of lead was documented in the Ecology and Environment, Inc. Site Hazard Assessment for Skykomish Train Yard, Skykomish, Washington (June 1991). At this time, additional investigation and a feasibility study are necessary to better characterize the nature and extent of contamination and to develop remedial alternatives.

III.

Ecology Determinations

1. The Burlington Northern Railroad is an "owner and operator" as defined in RCW 70.105D.020(6) of a "facility" as defined in RCW 70.105D.020(3).
2. The facility or "Site" is known as the Burlington Northern Skykomish Maintenance and Fueling Facility (Maintenance and Fueling Facility). The facility or Site includes the Maintenance and Fueling Facility and adjacent properties affected by the release of hazardous substances from the Maintenance and Fueling Facility and is located in Skykomish, Washington.
3. The substances found at the facility as described in II.5. Findings of Fact above are "hazardous substances" as defined in RCW 70.105D.020(5).
4. Based on the presence of these hazardous substances at the facility and all factors known to Ecology, there is a release or threatened release of hazardous substances from the facility, as defined at RCW 70.105D.020(10).
5. The release of petroleum products, PCBs, and lead is a threat or potential threat to human health and the environment.
6. By letter dated July 11, 1991, Ecology notified Burlington Northern Railroad of its status as a "potentially liable person" under RCW 70.105D.040 after notice and opportunity for comment.
7. Pursuant to RCW 70.105D.030(1) and 70.105D.050, Ecology may require potentially liable persons to investigate or conduct other remedial actions with respect to the release or threatened release of hazardous substances, whenever it believes such action to be in the public interest.

8. Based on the foregoing facts, Ecology believes that the remedial actions required by this Order are in the public interest.

IV.

Work to be Performed

Based on the foregoing Facts and Determinations, it is hereby agreed that Burlington Northern Railroad shall perform the following remedial actions and that these remedial actions be conducted in accordance with Chapter 173-340 WAC unless otherwise specifically provided for herein:

1. Remedial Investigation and Feasibility Study

Burlington Northern Railroad shall perform the remedial investigation and feasibility study as described fully in the RI/FS Work Plan attached as Exhibit A ("Work Plan"). The Work Plan is incorporated by this reference and is an integral and enforceable part of this Agreed Order. The Work Plan is designed to produce sufficient information regarding the site in order to enable the selection of a cleanup action pursuant to WAC 173-340-360. In the event that Ecology determines that sufficient information for selection of a cleanup action is not produced by performance of the Work Plan attached as Exhibit A, then Burlington Northern Railroad agrees to negotiate with Ecology for a supplemental RI/FS Work Plan. The RI/FS Work Plan contains a schedule that dictates when deliverables must be submitted to Ecology. Burlington Northern Railroad shall submit all draft documents for conducting remedial actions to Ecology for review within the time period specified within the RI/FS Work Plan. Ecology shall make best efforts to provide Burlington Northern Railroad with written comments regarding the adequacy of draft documents within 45 days of receipt of the draft documents.

The time allowed for Burlington Northern Railroad to perform any obligation dependent upon Ecology's review and approval shall be extended by the number of days that Ecology is late in completing such review or approval.

2. Monthly Progress Reports - Written monthly progress reports shall be submitted to Ecology which describe the actions taken by Burlington Northern Railroad during the previous month to implement the requirements of this Order. All progress reports shall be delivered by the fifteenth day of the month. The reports shall include but not be limited to the following items:

- 1) A list of activities that have taken place during the month;
- 2) Detailed description of any deviations from the Order or project plans;
- 3) Description of all deviations from the schedule and any planned deviations in the upcoming month, and plans for recovering lost time and maintaining compliance with the schedule;

3. Draft Cleanup Action Plan (CAP)

Burlington Northern Railroad shall prepare and submit to Ecology for review a draft Cleanup Action Plan (CAP). The draft CAP shall be completed in accordance with WAC 173-340-360(10), Draft Cleanup Action Plan. The tasks and schedule are as follows:

- A. A draft CAP outline shall be submitted to Ecology for review and approval 30 days after Ecology approves the RI/FS report. Revision of the draft CAP outline shall require approval by Ecology.

B. A draft of the draft CAP shall be submitted to Ecology ninety (90) days after the draft CAP outline is approved by Ecology. The draft submittal to Ecology shall include a hard copy of the draft of the draft CAP along with a copy of the draft on computer disk. The draft of the draft CAP shall be compatible with Ecology import requirements for the computer program WORDPERFECT.

4. Interim Actions

Burlington Northern Railroad shall submit to Ecology within 150 days of the initiation of field work for review a draft report which describes petroleum product plumes identified at the site and interim remedial actions evaluated to recover the petroleum product plumes. That evaluation will include discussion of potential interim remedial action alternative(s) for recovering the petroleum plumes. A final report shall be submitted 30 days after Ecology's review of the draft report. The final report shall require Ecology review and approval.

V.

Terms and Conditions of Order

1. Definitions

Unless otherwise specified, the definitions set forth in Chapter 70.105D RCW and Chapter 173-340 WAC shall control the meanings of the terms used in this Order.

2. Public Notices

WAC 173-340-600(10)(c) requires that, at a minimum, this Order be subject to 30 days public notice prior to the effective date of this Order.

Ecology shall be responsible for providing such public notice and reserves the right to modify, upon written agreement with Burlington Northern Railroad, or withdraw this Order should public comment disclose facts or considerations that indicate to Ecology that the Order is inadequate or improper in any respect.

3. Public Participation

Burlington Northern Railroad shall assist Ecology in preparing and/or updating a public participation plan for the Site. Ecology shall maintain the responsibility for public participation at the Site. Burlington Northern Railroad shall help coordinate and implement public participation for the Site. Ecology shall make best efforts to provide Burlington Northern Railroad an opportunity to review fact sheets, press releases and public notices in a timely manner before release and to evaluate Burlington Northern Railroad's comments prior to the release of such information.

4. Remedial Action Costs

Pursuant to and as limited by WAC 173-340-550(2), Burlington Northern Railroad agrees to pay those remedial action costs incurred by Ecology that are (1) reasonably attributable to the site, (2) related to this remedial action, (3) incurred after January 1, 1991. These costs shall include work performed by Ecology or its contractors for existing document review and evaluation, site visits, investigations, order preparation, negotiations, remedial actions, oversight, and administration. Ecology costs shall include costs of direct activities (e.g., employee salary, laboratory costs, travel costs, contractor fees, and employee benefit packages); and Ecology indirect costs of direct activities. Disputes regarding costs shall be resolved pursuant to Section V.9. Dispute Resolution.

Burlington Northern Railroad agrees to pay the required amount within 90 days of receiving from Ecology an itemized statement of costs that includes a summary of costs incurred, the indirect rate charged, a description of work performed, an identification of involved staff, and the amount of time spent by involved staff members on the project or within 30 days of completion of dispute resolution involving cost recovery. Itemized statements shall be prepared quarterly. Failure to pay Ecology's costs according to the terms of this paragraph may result in interest charges or other enforcement action legally available to Ecology.

5. Designated Project Coordinators

The project coordinator for Ecology is:

Ms. Barbara Trejo
Washington State Department of Ecology
3190 - 160th Avenue Southeast
Bellevue, Washington 98008-5452

Telephone Number (206) 649-7206

The project coordinator for Burlington Northern Railroad is:

Mr. David Seep
Burlington Northern Railroad
9401 Indian Creek Parkway
Suite 1400
Overland Park, Kansas 66201-9136

Telephone Number (913) 661-7015

The project coordinators shall be responsible for overseeing the implementation of this Order. To the maximum extent possible, communications between Ecology and Burlington Northern Railroad, and all documents, including reports, approvals, and other correspondence concerning the activities performed pursuant to the terms and conditions of this Order, shall be directed through the project coordinators.

Should Ecology or Burlington Northern Railroad change project coordinators, written notification shall be provided to Ecology or Burlington Northern Railroad at least ten (10) calendar days prior to the change.

6. Performance

All work performed pursuant to this Order shall be under the direction and supervision, as necessary, of a professional engineer or hydrogeologist, or similar expert, with appropriate training, experience and expertise in hazardous waste site investigation and cleanup. Burlington Northern Railroad shall notify Ecology as to the identity of such engineer(s) or hydrogeologist(s), and of any contractors and subcontractors to be used in carrying out the terms of this Order, in advance of their involvement at the Site.

7. Access

Subject to the terms and conditions set forth below, Ecology and/or Ecology authorized representatives shall have the authority to enter and freely move about the property owned by Burlington Northern Railroad that is on or adjacent to the site as defined in the attached work plan at all reasonable times for the purposes of, inter alia: inspecting records, operation logs, and contracts related to the work being performed pursuant to this Order; reviewing the progress in carrying out the terms of this Order; conducting such tests or collecting samples as Ecology or the project coordinator may deem necessary; using a camera, sound recording, or other documentary type equipment to record work done pursuant to this Order; and verifying the data submitted to Ecology by Burlington Northern Railroad.

Subject to Ecology's authority to take action deemed necessary to protect public health and the environment, Ecology agrees to the following terms and conditions of access to property owned by Burlington Northern Railroad: (1) Unless there is an emergency requiring immediate access, Ecology shall notify Burlington Northern Railroad's project manager or RETEC's project environmental engineer, leaving a message for both if neither is available, forty-eight (48) hours prior to conducting any activity within fifty (50) feet of a railroad track or transporting equipment or material across a railroad track; provided, however, that if a fence exists fifty (50) feet or more from a railroad track, Ecology need not notify Burlington Northern Railroad regarding activities conducted on the non-railroad side of the fence. If Burlington Northern Railroad objects to entry, then Burlington Northern Railroad will identify business operations that may be effected by access and Ecology shall make a good faith effort not to unreasonably interfere with business operations at the property. Except as provided above for activities conducted within fifty (50) feet of the railroad track, by signing this Agreed Order, Burlington Northern Railroad agrees that this Order constitutes reasonable notice of access.

To the extent that compliance with this Order requires access to property not owned or controlled by Burlington Northern Railroad, Burlington Northern Railroad shall exercise its best effort to obtain signed access agreements that allow access for itself, its contractors and agents, and Ecology's authorized representatives. Burlington Northern Railroad shall provide Ecology copies of such agreements. With respect to property that is not owned by Burlington Northern Railroad and upon which monitoring wells, pumping wells,

treatment facilities, or other response actions are to be located, Burlington Northern Railroad will exercise its best effort to obtain access agreements that condition conveyance of title, easement, or other interest in the property upon both the advance notification of Ecology of the transfer as well as the continued operation of such wells, treatment facilities, or other response actions on the property.

Ecology shall allow split or replicate samples to be taken by Burlington Northern Railroad during an inspection unless doing so interferes with Ecology's sampling. Burlington Northern Railroad shall allow split or replicate samples to be taken by Ecology unless doing so interferes with Burlington Northern's sampling and shall provide seven (7) days notice before any sampling activity.

8. Retention of Records

Burlington Northern Railroad shall preserve in a readily retrievable fashion, during the pendency of this Order and for ten (10) years from the date of completion of the work performed pursuant to this Order, all records, reports, documents, and underlying data in its possession relevant to this Order. Should any portion of the work performed hereunder be undertaken through contractors or agents of Burlington Northern Railroad, then Burlington Northern Railroad agrees to include in their contract with such contractors or agents a record retention requirement meeting the terms of this paragraph.

9. Dispute Resolution

Burlington Northern Railroad may request Ecology to resolve disputes which may arise during the implementation of this Order. Such request shall be in writing and directed to the signatory of this Order.

Ecology resolution of the dispute shall be binding and final.

Burlington Northern Railroad is not relieved of any requirement of this Order during the pendency of the dispute and remains responsible for timely compliance with the terms of the Order unless otherwise provided by Ecology in writing.

10. Reservation of Rights/No Settlement

This Agreed Order is not a settlement under Chapter 70.105D RCW.

Ecology's signature on this Order in no way constitutes a covenant not to sue or a compromise of any Ecology rights or authority.

Ecology will not, however, bring an action against Burlington Northern Railroad to recover remedial action costs paid to and received by Ecology under this Order. In addition, Ecology will not take additional enforcement actions against Burlington Northern Railroad to require those remedial actions required by this Order, provided Burlington Northern Railroad complies with this Order. Ecology reserves the right, however, to require additional remedial actions at the Site should it deem such actions necessary. This Order shall not be construed to waive Burlington Northern Railroad's right to bring an action for contribution or to recover costs under MTCA or any other authority against any other party.

Ecology also reserves all rights regarding the injury to, destruction of, or loss of natural resources resulting from the releases or threatened releases of hazardous substances from the Burlington Northern Rail Yard.

11. Endangerment

In the event Ecology determines that conditions at the Site are creating or have the potential to create a danger to the health or welfare of the people on the Site or in the surrounding area or to the environment, Ecology may order Burlington Northern Railroad to stop further implementation of this Order for such period of time as needed to abate the danger. In the event that Ecology issues such an order, and if Ecology determines it necessary to modify deadlines, Ecology may provide written notification that all deadlines under this Order are suspended and time periods extended to correspond to the delay created by the work stoppage periods of time as necessary to abate the danger.

12. Transference of Property

No voluntary or involuntary conveyance or relinquishment of title, easement, leasehold, or other interest in any portion of the Site shall be consummated by Burlington Northern Railroad without provision for continued implementation of all requirements of this Order and implementation of any remedial actions found to be necessary as a result of this Order.

Prior to transfer of any legal or equitable interest Burlington Northern Railroad may have in the Site or any portions thereof, Burlington Northern Railroad shall serve a copy of this Order upon any prospective purchaser, lessee, transferee, assignee, or other successor in such interest. At least thirty (30) days prior to finalization of any transfer, Burlington Northern Railroad shall notify Ecology of the contemplated transfer.

13. Compliance with Other Applicable Laws

All actions carried out by Burlington Northern Railroad and Ecology pursuant to this Order shall be done in accordance with all applicable federal, state, and local requirements.

14. Revisions to the Scope of Work and Schedule

Revisions to the scope of work or to the schedule may be granted only when a request for revision is submitted within five business days after Burlington Northern Railroad knew or should have known of the need for the revision, and when good cause exists for granting the revision. All revisions shall be requested in writing. The request shall specify the reason(s) the revision is needed. A revision of schedule shall be granted for such period as Ecology determines is reasonable under the circumstances. A requested revision shall not be effective until approved by Ecology, which approval shall be confirmed in writing.

The burden shall be on Burlington Northern Railroad to demonstrate to the satisfaction of Ecology that good cause exists for granting a revision. Good cause includes, but is not limited to, the following:

- A. Circumstances entirely beyond the control and which cannot be overcome by the due diligence of Burlington Northern Railroad such as difficulty in obtaining access to property not owned or controlled by Burlington Northern Railroad.
- B. Delays directly attributable to: changes in a permit; the need to comply with permit terms or conditions; the appeals of or the lack of a permit; and/or the need to obtain concurrence, or approval to implement the terms of this Order, provided that Burlington Northern Railroad filed a timely application for such a permit, concurrence or approval; and

- C. Acts of God, including fire, flood, blizzard, extreme temperatures, storm, earthquake, wave or water conditions, strikes or other labor disputes, or other unavoidable casualty.

Neither increased costs of performance of the terms of this Order, nor changed economic circumstances, nor unavailability of qualified personnel to perform work required by the terms of this Order shall be considered good cause for granting a revision. If Burlington Northern Railroad and Ecology cannot agree that there is good cause for granting a revision, either party may invoke dispute resolution. This Order may only be modified by mutual written agreement, except that the schedule extensions may be granted in writing by Ecology.

VI.

Satisfaction of this Order

The provisions of this Order shall be deemed satisfied upon Burlington Northern Railroad's receipt of written notification from Ecology that Burlington Northern Railroad has completed the remedial activity required by this Order, as amended by any modifications, and that all other provisions of this Agreed Order have been complied with.

VII.

Enforcement

Pursuant to RCW 70.105D.050, this Order may be enforced as follows:

- A. The Attorney General may bring an action to enforce this Order in a state or federal court.
- B. The Attorney General may seek, by filing an action, if necessary, to recover amounts spent by Ecology for investigative and remedial actions and orders related to the Site.

C. In the event Burlington Northern Railroad refuses, without sufficient cause, to comply with any term of this Order, Burlington Northern Railroad will be liable for:

(1) up to three times the amount of any costs incurred by the State of Washington as a result of its refusal to comply;

(2) civil penalties of up to \$25,000 per day for each day Burlington Northern Railroad refuses to comply; and

D. This Order is not appealable to the Washington Pollution Control Hearings Board. This Order may be reviewed only as provided under 70.105D.060 RCW.

Effective date of this Order: September 16, 1993

BURLINGTON NORTHERN RAILROAD

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

By David C. Seep

By Michael J. Gallagher

Date 7/16/93

Date 9/16/93

Exhibit A

**Burlington Northern Railroad
Remedial Investigation/Feasibility Study Work Plan
Skykomish, Washington
July 6, 1993**